Supreme Court, U.S.
FILED
OCT 25 1993
OFFICE OF THE CLERK

(2)

No. 93-215

In the Supreme Court of the United States

OCTOBER TERM, 1993

FRANCIS R. SABLONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

ERIC SUMMERGRAD
Principal Assistant General Counsel

RANDALL W. QUINN
Senior Litigation Counsel

MARK PENNINGTON
Special Counsel
Securities and Exchange Commission
Washington, D.C. 20549

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether petitioner's trading in securities while in possession of material non-public information that was misappropriated from a financial publication violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5.

2. Whether information that has not been disseminated to the investing public is rendered public when there has been a limited distribution of the information immediately before its official release time and there may have been some trading on the information before its official release.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Affiliated Ute Citizens v. *United States*, 406 U.S. 128 (1972)	7
Basic Inc. v. *Levinson*, 485 U.S. 224 (1988)	15
Billard v. *Rockwell Int'l Corp.*, 683 F.2d 51 (2d Cir. 1982)	12
Carpenter v. *United States*, 484 U.S. 19 (1987)	7, 9
Chiarella v. *United States*, 445 U.S. 222 (1980)	10
Dirks v. *SEC*, 463 U.S. 646 (1983)	9
Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976)	7
Faberge, Inc., In re, 45 S.E.C. 249 (1973)	12
Rothberg v. *Rosenbloom*, 771 F.2d 818 (3d Cir. 1985)	7
SEC v. *Callahan*, 1990 Fed. Sec. L. Rep. (CCH) ¶ 95,609 (C.D. Cal. July 12, 1990)	10
SEC v. *Cherif*, 933 F.2d 403 (7th Cir. 1991), cert. denied, 112 S. Ct. 966 (1992)	6
SEC v. *Clark*, 915 F.2d 439 (9th Cir. 1990)	6
SEC v. *MacDonald*, 568 F. Supp. 111 (D.R.I. 1983), aff'd, 725 F.2d 9 (1st Cir. 1984)	13
SEC v. *Materia*, 745 F.2d 197 (2d Cir. 1984), cert. denied, 471 U.S. 1053 (1985)	6, 8
SEC v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969)	12
Superintendent of Insurance v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1971)	8

Cases—Continued: Page

United States v. *Carpenter*, 791 F.2d 1024 (2d Cir. 1986), aff'd, 484 U.S. 19 (1987) 6, 10
United States v. *Chestman*, 947 F.2d 551 (2d Cir. 1991), cert. denied, 112 S. Ct. 1759 (1992) 5
United States v. *Naftalin*, 441 U.S. 768 (1979) 8
United States v. *Newman*, 664 F.2d 12 (1981), aff'd, 722 F.2d 729 (2d Cir.), cert. denied, 464 U.S. 863 (1983) 6-7, 8

Statutes and regulation:

Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 11
Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*:
§ 10(b), 15 U.S.C. 78j(b) 2, 6, 7
§ 20A, 15 U.S.C. 78t-1 11
§ 21A, 15 U.S.C. 78u-1 11
§ 32, 15 U.S.C. 78ff 2
18 U.S.C. 371 2
17 C.F.R. 240.10b-5 (Rule 10b-5) 2, 6, 7, 13

Miscellaneous:

H.R. Rep. No. 910, 100th Cong., 2d Sess. (1988) 11

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-215

FRANCIS R. SABLONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, Pet. App. 2a-25a, is reported at 989 F.2d 596.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1993. A petition for rehearing was denied on May 12, 1993. Pet. App. 26a-27a. The petition for a writ of certiorari was filed on August 10, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted on one count of conspiracy, in violation of 18 U.S.C. 371, and 59 counts of securities fraud, in violation of Sections 10(b) and 32 of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78j(b) and 78ff, and Rule 10b-5, 17 C.F.R. 240.10b-5. Pet. App. 5a. Petitioner was sentenced to six months' home confinement, three years' probation, and 400 hours of community service, and was fined $5,000. C.A. App. 37-38.

1. Petitioner traded in securities while in possession of wrongfully obtained, non-public information contained in pre-publication copies of articles in *Business Week* magazine. R.R. Donnelley & Sons Co. (Donnelley) was the printer of *Business Week*, a weekly publication owned by McGraw-Hill, Inc. Each week, the printing of *Business Week* began late on Wednesday evening and continued into Thursday. Since at least 1981, both McGraw-Hill and Donnelley followed a policy of keeping the contents of the weekly issue of *Business Week* confidential until 5:00 p.m. on Thursday. Pet. App. 5a-6a.

Donnelley employees knew that company rules forbade the removal of magazines from the plant. At orientation, new employees were advised of the need to maintain the confidentiality of customer materials. Employees also received a Donnelley handbook advising them of the confidentiality policy. The handbook forbade even the discussion of the contents of magazines, much less their removal. Employee manuals placed at several locations throughout the plant contained similar warnings. In addition, a poster was

placed in the employee entrance hallway stating that all customer materials were to be treated with absolute confidence. Pet. App. 6a-8a.

In early 1986, William Dillon, whose wife was a Donnelley employee, obtained copies from her of *Business Week* on Friday mornings (by which time it was public) when she came home after her four-to-midnight Thursday shift. Dillon began tracking the stocks of companies analyzed in Gene Marcial's "Inside Wall Street," a regular *Business Week* column. The column recommended investing in various companies based on Marcial's consultation with analysts and other sources. Dillon observed that trades in favorably mentioned securities often increased in volume and price, beginning on the Wednesday before publication and continuing through the next Monday. Pet. App. 9a.

Recognizing that it would be valuable to receive *Business Week* earlier than Friday morning, Dillon made arrangements with another Donnelley employee to obtain a copy of the magazine, or simply a copy of the "Inside Wall Street" column, at 9:00 a.m. on Thursday mornings. When that employee changed his shift and could no longer provide copies, Dillon approached another Donnelley employee, William Sady, who agreed to bring the magazine out at the end of his midnight-to-eight Thursday morning shift. Sady delivered the magazine to Dillon over a two-year period at an initial price of $20 per copy. Pet. App. 9a-10a.

In the summer of 1986, Dillon approached his friend Brad Libera and told him that early investment in securities named in the "Inside Wall Street" column was a profitable strategy. Libera, who initially

accompanied Dillon to the magazine deliveries and later began making the pick-ups alone, executed a total of 64 Thursday trades in such stocks, resulting in a profit of approximately $95,000. Pet. App. 10a-11a.

In the summer of 1986, petitioner, who is an attorney, met Libera. He and Libera used the same stock broker, Ralph Presutti, at Advest, Inc. Petitioner learned of Libera's early acquisition of copies of *Business Week* and of his trading on information in the "Inside Wall Street" column. Petitioner began receiving information from either Libera or Presutti and began trading regularly on Thursday mornings in securities discussed in the column. Dillon testified that in early 1987 he informed petitioner that Donnelley employees were not permitted to remove magazines from the plant and that Sady was being paid $30 per copy for the magazine. Petitioner made 57 trades for a profit of approximately $36,000. Pet. App. 11a.

In the spring of 1987, petitioner took his trading business to Nicholas Bokron of E.F. Hutton & Co. He told Bokron that some of his trades were based on *Business Week* information. In late September, Bokron was informed by his superiors that trading in securities based on early acquisition of *Business Week* raised serious questions of illegal insider trading. Bokron contacted petitioner, advised him of his superior's concerns, and told him that he would not accept any more trades based on *Business Week* information. On five subsequent occasions petitioner traded in securities based on *Business Week* information with other brokerage houses. Pet. App. 12a.

2. The court of appeals affirmed petitioner's conviction. Pet. App. 2a-25a. The court observed that petitioner's prosecution was based on the "misappro-

priation theory" of securities fraud. *Id.* at 12a. It described that theory as holding that "[o]ne who misappropriates nonpublic information in breach of a fiduciary duty and trades on that information to his own advantage violates Section 10(b) and Rule 10b-5." *Id.* at 14a, quoting *United States* v. *Chestman*, 947 F.2d 551, 564 (2d Cir. 1991) (en banc), cert. denied, 112 S. Ct. 1759 (1992). The court explained that the misappropriation theory "does not require that the buyer or seller of securities be defrauded." Pet. App. 15a, quoting *Chestman*, 947 F.2d at 566. Rather, "the predicate act of fraud may be perpetrated on the source of the nonpublic information, even though the source may be unaffiliated with the buyer or seller." Pet. App. 15a, quoting *Chestman*, 947 F.2d at 566.

The court of appeals rejected petitioner's argument that he could not be held liable as a tippee of the information unless his tipper specifically knew that the tip would lead to trading on the information. The court held that such proof "is not required" by the case law and "would serve no purpose other than to create a loophole" for misuse of wrongfully obtained information. Pet. App. 15a-18a.

The court of appeals also held that the evidence was sufficient to establish that the information obtained by petitioner was non-public. Pet. App. 19a. The court found that there was no public release of the information before 5:00 p.m. on Thursday and rejected the argument that even though the information had not been publicly announced, it was public because trades in the stocks mentioned in the "Inside Wall Street" column began increasing in volume and price on Wednesday. The court stated that "trading on stolen information that is not fully impounded in price

is a misuse of such information whether or not others are also trading on it." *Id.* at 20a. "Because [petitioner] concede[s] that the increase in volume and price of the securities in question continued after the release of the magazine to the general public," the court found that "the information was not fully impounded in the price at the time of [petitioner's] trades" and thus was not public. *Id.* at 21a.

Finally, the court held that the evidence was sufficient to establish that petitioner knew that the information he received was obtained in breach of a duty. Pet. App. 22a-24a.

ARGUMENT

1. Petitioner contends (Pet. 12, 16-17) that the misappropriation theory of liability under the securities laws does not apply in this case because the only victim of the fraud "was the magazine publisher, McGraw-Hill, which undeniably lacked any interest in the purchase [or] sale * * * of the securities traded." Pet. 13. That contention is unfounded.

Under the misappropriation theory of liability, the fraudulent misappropriation of material non-public information in connection with the purchase or sale of securities violates Section 10(b) of the Exchange Act and Rule 10b-5. The misappropriation theory has been adopted by every court of appeals that has considered it. See *SEC* v. *Cherif*, 933 F.2d 403 (7th Cir. 1991), cert. denied, 112 S. Ct. 966 (1992); *SEC* v. *Clark*, 915 F.2d 439 (9th Cir. 1990); *United States* v. *Carpenter*, 791 F.2d 1024 (2d Cir. 1986), aff'd in relevant part by an equally divided Court, 484 U.S. 19 (1987); *SEC* v. *Materia*, 745 F.2d 197 (2d Cir. 1984), cert. denied, 471 U.S. 1053 (1985); *United States* v. *Newman*, 664 F.2d 12 (1981), aff'd after remand, 722 F.2d 729 (2d Cir.)

(Table), cert. denied, 464 U.S. 863 (1983). See also *Rothberg* v. *Rosenbloom*, 771 F.2d 818, 825 (3d Cir. 1985) (Higginbotham, J., concurring).

Petitioner does not challenge the validity of the misappropriation theory in general, but seeks review of the theory only as applied to cases in which the "victim of the alleged fraud" is not a market participant. Pet. 12. Section 10(b) and Rule 10b-5 are not restricted to frauds on a market participant. Those provisions make it unlawful to engage in "any act * * * which operates or would operate as a fraud or deceit upon any person," where that fraud occurs "in connection with" a securities transaction. 15 U.S.C. 78j(b) and Rule 10b-5, 17 C.F.R. 240.10b-5(c). This Court has consistently construed those provisions broadly, noting that Section 10(b) is "a 'catchall' clause to enable the Commission 'to deal with new manipulative [or cunning] devices,'" *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 203 (1976) (brackets added by Court), and that the statute and rule "are obviously meant to be inclusive." *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 151 (1972).

Petitioner's conduct falls within the scope of those provisions. There is no dispute that petitioner engaged in a fraud by deceitfully depriving McGraw-Hill of the exclusive use of confidential information. See *Carpenter* v. *United States*, 484 U.S. 19, 27-28 (1987) (affirming mail and wire fraud convictions for trading while in possession of information misappropriated from newspaper). The sole question is whether that fraud was "in connection with" the purchase or sale of securities, since McGraw-Hill was not itself trading in the securities involved.

This Court has construed the "in connection with" requirement expansively. See *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 12-13 (1971) (applies to "deceptive practices touching" a securities transaction); see also *United States* v. *Naftalin*, 441 U.S. 768 (1979) (in government enforcement action the victim of securities fraud need not be a purchaser or seller, or even an investor). That requirement is satisfied here. The information that was misappropriated was *Business Week*'s advice concerning securities. The "sole purpose" for misappropriating that information was to use it to trade in securities. See *Newman*, 664 F.2d at 18; *Materia*, 745 F.2d at 203. The fraud was integrally related to the misappropriator's securities transactions; indeed, to him the stolen information "ha[d] no value whatsoever except 'in connection with' his subsequent purchase of securities."[1] *Materia*, 745 F.2d at 203.

Petitioner errs in contending (Pet. 16-17) that McGraw-Hill "was not defrauded of anything which was securities-related, which would invoke the protection of Rule 10b-5." *Business Week*'s information was inherently "securities-related"; it consisted of discussions and recommendations about publicly

---

[1] Petitioner contends (Pet. 17 & n.3) that the government's theory in this case "would reach any type of property theft even if the property was absolutely unrelated to securities," and gives, as an example, one who steals money and then uses it to buy securities. Courts have upheld liability under the misappropriation theory, however, only when the theft in question involves information, and they have required that the information be material to a decision to buy or sell securities. Property that is "absolutely unrelated to securities" does not meet the latter criterion, and petitioner's hypothetical meets neither criterion.

traded stocks, and the primary value of that information flowed from its utility in making investment decisions. Maintaining the confidentiality of that information before publication protected *Business Week*'s reputation for integrity.[2] See *Dirks* v. *SEC*, 463 U.S. 646, 658-659 (1983) (noting the importance of securities analysts to the efficient functioning of capital markets). It also preserved the value of the information to investors who might wish to trade on the basis of it. Investors who rely on *Business Week*'s information assume that it has not previously been the subject of trading by others. Petitioner's conduct undermined *Business Week*'s ability to provide investors with such "fresh" information. Accordingly, application of the misappropriation theory in this case furthers the purpose of the securities laws to protect investors.[3]

---

[2] Petitioner is incorrect in asserting (Pet. 13) that "the only alleged harm from the so-called fraudulent scheme was the deprivation of McGraw-Hill's intangible right to keep secret the information contained in the magazine or to release the information at its whim, accompanied by whatever loss of reputation McGraw-Hill purportedly suffered by the revelation of the fact that it had difficulty enforcing its own corporate policies." Keeping the information confidential before publication was not a matter of "whim" but of business necessity. And, applying the misappropriation theory in this case does not entail the use of the federal securities laws "to enforce internal corporate policies." Pet. 14. Confidential business information has long been considered property under common law concepts, and criminal and civil provisions protect that property right in a variety of contexts. *Carpenter* v. *United States*, 484 U.S. at 27-28.

[3] There is no merit to petitioner's contention (Pet. 15-16) that the court of appeals' decision resurrects the "parity of information" theory of liability rejected by this Court in

While petitioner suggests (Pet. 28) that the decision in this case has a "wide-ranging * * * effect," there is no conflict in the lower courts with respect to the issue in this case; it has arisen in only this and two other cases. *United States* v. *Carpenter*, 791 F.2d 1024 (2d Cir. 1986) (theft of information from the *Wall Street Journal*), aff'd in relevant part by an equally divided court, 484 U.S. 19 (1987); *SEC* v. *Callahan*, 1990 Fed. Sec. L. Rep. (CCH) ¶ 95,609 (C.D. Cal. July 12, 1990) (theft of *Business Week* information). And, in view of this Court's holding in *Carpenter* that schemes like petitioner's violate the mail and wire fraud statutes, the imposition of criminal liability in this context cannot have come as a surprise to petitioner.

Moreover, since the recognition of the misappropriation theory by the courts, Congress has provided remedies for insider trading violations based on the misappropriation theory, and in no instance has Congress drawn a distinction between fraud on market participants and fraud on non-market partici-

---

Chiarella v. *United States*, 445 U.S. 222 (1980). The "parity of information" theory proscribed "[t]he use by anyone of material information not generally available." *Id.* at 232. The misappropriation theory does not impose liability because the trader has information unavailable to others. It imposes liability because information is acquired through a fraud on the source of the information. *Chiarella* left open the question whether liability under Rule 10b-5 could be founded on the misappropriation theory (the theory had not been presented to the jury in that case, 445 U.S. at 235-236), and all four Justices who spoke to the issue suggested that liability for misappropriation would be valid. See *id.* at 239 (Burger, C.J., dissenting); *id.* at 238 (Brennan, J., concurring in the judgment); *id.* at 245 (Blackmun, J., joined by Marshall, J., dissenting).

pants. See 15 U.S.C. 78u-1 (authorizing the Commission to seek penalties for insider trading); 15 U.S.C. 78t-1 (providing contemporaneous traders in the market with an express cause of action for damages against persons who engage in violations by purchasing or selling securities while in possession of material, non-public information). Indeed, the legislative history of the Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677, indicates approval of the misappropriation theory as applied in *Carpenter* where, as in this case, the victim of the fraud was a financial publication.[4]

2. Petitioner contends (Pet. 18-23) that he committed no fraud because the contents of *Business Week*'s "Inside Wall Street" column were already public "as a matter of law" (Pet. 18-19) at the time he traded. He also contends (Pet. 23-27) that the court of appeals applied an incorrect test in rejecting his claim that pre-publication trading rendered the information no longer confidential. The court of appeals correctly held that the evidence was sufficient to establish that the information was non-public at the time of petitioner's trades.

a. Petitioner argues that the information was public because the magazine's publisher "voluntarily released hundreds of copies of *Business Week* on Thursday afternoons to members of the media * * * despite its own policy that the magazine not be distributed until 5:00 p.m." (Pet. 18), and those mem-

[4] After discussing the misappropriation theory generally and the *Carpenter* case specifically, the House Committee Report stated that "this type of security fraud should be encompassed within Section 10(b) and Rule 10b-5." H.R. Rep. No. 910, 100th Cong., 2d Sess. 10 (1988).

bers of the press had no obligation to keep the information confidential or to refrain from trading on the basis of it. Pet. 19-20.

The court of appeals correctly held that distribution of the magazine to other press organizations did not constitute public dissemination of its contents. As the court explained, the magazines were "sent to McGraw-Hill's press manager at noon, packaged in the afternoon, and distributed by messenger in time for 'the nightly news.' There was a message on the press package prohibiting release of the information until after 5:00 p.m. The jury could thus easily conclude that there was no public announcement of the information before 5:00 p.m." on Thursday. Pet. App. 19a-20a.

The evidence showed that petitioner was "trading regularly on Thursday mornings," Pet. App. 11a, before *any* distribution was made to the press. Even if petitioner made some trades after the magazine was given to the press, however, the information was not publicly disseminated at that point. Under established law, petitioner was barred from trading until the non-public information "ha[d] been effectively disclosed in a manner sufficient to insure its availability to the investing public." *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 854 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969).[5] Even if the press

[5] See *In re Faberge, Inc.*, 45 S.E.C. 249, 256 (1973) ("Proper and adequate disclosure of significant corporate developments can only be effected by a public release through the appropriate public media, designed to achieve a broad dissemination to the investing public generally and without favoring any special person or group."); *Billard* v. *Rockwell Int'l Corp.*, 683 F.2d 51, 55 (2d Cir. 1982) (*Texas Gulf Sulphur* held that "Rule 10b-5

organizations had time to disclose the magazine's contents, they did not do so, likely because they were under the constraint of the publisher's directive not to make disclosure before 5:00 p.m.[6] And petitioner does not claim that dissemination to press outlets, who kept the information under wraps, itself constituted dissemination "to the investing public."

Petitioner also suggests (Pet. 21-22) that the information was public because there was increased trading activity in the stocks at issue in the two days before release of the magazine. The fact that others may have traded on non-public information does not mean that the information necessarily had become public, however. As the court of appeals noted, petitioner's rule would grant a safe haven for those who improperly trade while in possession of confidential material, provided only that some other person had already so traded. Pet. App. 20a-21a.

b. Petitioner also attacks (Pet. 23-27) the approach taken by the court of appeals in its rejection of his

---

prohibited trading by insiders possessing confidential information which had been released but had not appeared on the Dow Jones broad tape and thus was not yet in the public domain"); *SEC* v. *MacDonald*, 568 F. Supp. 111, 112-113 (D.R.I. 1983) (insider trader's disgorgement obligation calculated based on price of stock "a reasonable time after public dissemination of the insider information"), aff'd, 725 F.2d 9 (1st Cir. 1984).

[6] Petitioner argues (Pet. 20) that the directive imposed no fiduciary or other legal restraint on disclosure by the press. The issue, however, is not whether the press had the theoretical right to make disclosure; it is whether disclosure to the press rendered the information public for purposes of Rule 10b-5. The directive acted as a powerful practical constraint, and there was no showing that the press made actual disclosure before 5:00 p.m.

claim that pre-publication trading by other persons rendered the *Business Week* information public. The court of appeals stated that information could become public, "even though there has been no public announcement," when trading is so widespread that the information has been fully "impounded" into the price of the security; according to the court, "such information can no longer be misused by trading because no further profit can be made." Pet. App. 20a. The court found, however, that petitioner failed to establish that the information in his possession was "fully impounded in the price" at the time of his trades. *Id.* at 21a.

Petitioner argues (Pet. 24) that the court added a new element to the law of insider trading by requiring, not only that information be publicly announced, but also that it be "fully impounded" in the price of a security to be public. He suggests (Pet. 25) that using "impoundment" as a proxy for the "'public nature' of information" leads to irrational results, and he complains (Pet. 26-27) that he did not have an adequate opportunity to address that issue at trial.

The court of appeals did not add a new element of "impoundment" to the law of insider trading. The court concluded that even when there is no public announcement, information may nonetheless be considered to be public when it is fully reflected in the stock price. Pet. App. 20a. The court did not suggest that information that is made public by an announcement must *also* be made public by impoundment. Accordingly, petitioner's hypothetical situation (Pet. 25) in which liability would attach when information has been publicly released but is not fully reflected in

the stock price does not arise under the court of appeals' holding.[7]

Nor was petitioner denied a chance to put on evidence addressing the issue of impoundment. Because a major portion of petitioner's defense at trial was that the *Business Week* information was made public before his trading, he had every incentive to put on all evidence concerning the price behavior of the stocks. He likely did not do so because, as he conceded in the court of appeals, "the securities were sold immediately [by Dillon on Monday morning] to

---

[7] While the court of appeals correctly found that there was no public disclosure of the *Business Week* information at issue in this case before petitioner's trading, we disagree with the court of appeals' statement that information may become "public" by being impounded into the price of a security. It is true that "most publicly available information is reflected in market price," *Basic Inc.* v. *Levinson*, 485 U.S. 224, 247 (1988), but it does not follow that all information that is reflected in market price has become public. Undisclosed information that is impounded into the price of the security has become "known" to the public only in an indirect, economic sense, which is not the equivalent of publicly announcing the information. The owner of the information continues to have the right to bar its use, and trading in such circumstances is just as much a violation of that right as at any earlier time. If, by the fortuity of "impoundment," the misappropriator does not profit from his trading, it would not exonerate him from fraud or render civil or criminal remedies inappropriate. The court of appeals' statement that disclosure can occur through impoundment, however, does not warrant review here. The court found that disclosure did not occur by that means in this case and that whatever dissemination of the *Business Week* information occurred prior to petitioner's trading did not amount to public disclosure. That conclusion is correct, and review of the "impoundment" theory, if warranted, can await a case in which it affects the outcome.

capitalize on the release of the information." Pet. C.A. Br. 46 & n.16. If the information had been fully impounded by the time of petitioner's purchases, its release would have had no effect on the market and there would have been no price movement on which to "capitalize."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

ERIC SUMMERGRAD
Principal Assistant General Counsel

RANDALL W. QUINN
Senior Litigation Counsel

MARK PENNINGTON
Special Counsel
Securities and Exchange Commission

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

OCTOBER 1993